AZIZI AMRAN

v.

HIZZAM CHE HASSAN

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-76-1999]
9 OCTOBER 2003

DAMAGES: *Personal injuries - Pain and suffering - Quantum - Fracture of left femur - Fracture of left tibia with 2 - 2.5cm shortening - Award of RM28,000 for pain and suffering - Whether adequate - Loss of earning capacity - Whether to be awarded*

The plaintiff had suffered from a fracture of the left femur and a shortening of the left tibia following an accident for which the defendant was found to be wholly liable. The fracture and shortening apart, the plaintiff had also suffered from certain residuals, such as having to walk with a limp, wasting of the muscles of the left leg and inability to squat. The Sessions Court awarded the plaintiff RM28,000 for pain and suffering. The plaintiff argued that the award was inadequate, and further that there ought also to be an award for loss of future earning, and in the circumstances appealed against the quantum awarded. The issue was whether the award by the court below ought to be disturbed, bearing in mind that some 1.5 - 2cm of the 4cm shortening was attributable to an unrelated accident earlier, and that the plaintiff, who had been working as an operator earning about RM600 a month prior to the accident, had voluntarily refused to return to his old job but opted instead to work as a labourer.

Held:

[1] The actual shortening attributed to the present accident is only 2 - 2.5cm shortening. This is the damage that the present defendant is liable for. In any case there was evidence led that the plaintiff had already made a claim for the previous 2cm shortening through another counsel. The plaintiff cannot be allowed to enrich himself twice. (p 512 g-h)

[2] There is no plausible reason to interfere with the award made. Award of damages must be kept to a reasonable sum. It must not be seen that in awarding damages for physical injuries, the courts are inclined to be punitive. Damages must be compensatory. (p 513 e)

[3] The question of loss of earning capacity should only be raised if there is a substantial or real risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. In this case, the plaintiff not only did not on his own free will return to his former employment despite the employer's willingness to consider giving him a sedentary job, but chose instead to be a labourer, whereby he has to do all those functions that the specialist said he would find difficulty in doing, namely squatting, going up and down the stairs and carrying heavy loads. Clearly, this is a fanciful case of the plaintiff losing his employment. (p 514 b-d)

[Appeal dismissed.]

Case(s) referred to:

Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(refd)***

Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(refd)***

Juminah Tonkon & Anor v. Yim Kam Cheng & Anor [1991] Mallal's Digest Para 990 ***(refd)***

Moeliker v. A Reyrolle and Co Ltd [1977] 1 All ER 9 ***(refd)***

For the appellant/plaintiff - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co

For the respondent/defendant - Theeba Jothi Jayaram; M/s Kumar & Co

Reported by WA Sharif

JUDGMENT

RK Nathan J:

This is the plaintiff's appeal only in respect of quantum, the defendant having been found totally liable for the accident. Mr. Brijnandan for the plaintiff argued:

(a) that the award for pain and suffering amounting to RM28,000 was too low;

(b) that there should have been an award for loss of earning capacity.

Findings Of The Court

(a) Pain And Suffering

The first medical report stated that as of the date of accident that is 7 April 1996, the plaintiff was in hospital for 18 days. The injuries were as follows:

1. Closed supracondylar fracture of left femur with comminution;

2. Closed fracture mid-shaft of left tibia;

3. Old fracture of upper 1/3, left tibia.

Management:

1. Plating of left femur with bone grafting done under spinal anesthesia after 16 days of admission to hospital;

2. Fracture of left tibia was managed conservatively.

The Specialist Report

The orthopedic specialist examined the plaintiff on 18 July 1997.

The findings of the specialist were:

1. Although walked with a limping gait, able to walk unaided;

2. Left leg was 4cm shorter than the right;

3. Thigh girths when measured 10cm from the upper poles of the knee caps showed the right to be 43cm and the left 40 1/2cm indicating wasting of the muscles of the left leg.

4. Scars

   (a) 23cm long scar over the lateral aspect of the left lower thigh;

   (b) 7cm bone graft donor scar over the anterior aspect of the right iliac crest.

5. Swelling around the knee joint with bow legged deformity of 10° of the knee joint with a range of movements of flexion being 0°-80° (Normal: 0°-150°) .

6. Whilst he was able to stand on one leg he was unable to squat.

7. The fracture of the femur has united with angulation and the shortening. There is a plate and screws across the fracture site.

8. The cost of removal of the plate and screws with hospitalisation will be RM3,000.

9. Inevitable that he would gradually develop osteoarthritis of the knee joint.

Subsequent to his earlier report, the same specialist gave another report also about a year later wherein he confirmed that about 1.5-2cm of the shortening was due to the old fracture. Therefore he opined that the accident in question had left the plaintiff with.a shortening of 2-2.5cm.

The Sessions Court awarded as follows:

1. closed supracondylar fracture of the left femur with comminution	
2. closed fracture of the mid shaft of the left tibia with 4cm shortening	RM25,000
3. 23cm scar over the lateral aspect of the left lower thigh	RM 3,000
	RM28,000

In the lower court, counsel for the plaintiff submitted for RM50,000 without citing any authorities. The court relied on *Balakrishnan s/o Kunjamboo Nair v. Savastine Anthony s/o Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 where for a fracture of the femur with 4cm shortening the court had awarded RM20,000.

Before me, Mr. Brijnandan argued that the court must accept the man as he is, that is, that he is suffering from 4cm shortening and that the court ought to make an award on that basis. I do not think that this is a fair submission to make. A tort-feasor is only liable for the actual and related consequential suffering occasioned to the plaintiff as a direct result of the tort-feasor's negligence. Here the specialist has in no uncertain terms, attributed 1.5-2cm shortening as being due to the earlier unrelated accident. The actual shortening attributed to the subsequent accident is 2-2.5cm shortening. This is the damage that the present defendant is liable for. In any case there was evidence led that the plaintiff had already made a claim for the previous 2cm shortening through another counsel. Thus Mr. Brijnandan's request to treat this case like the egg-shell cases is totally out of line as the plaintiff cannot be allowed to enrich himself twice, over the same injury.

Counsel for the plaintiff referred me to *Juminah bte Tongkon & Anor v. Yim Kam Cheng & Anor* [1991] Mallal's Digest para 990 where in 1991 the court awarded RM40,000 for a fracture of left femur and left tibia with 3cm shortening. Unfortunately the reporting is too condensed to be of use for comparison. Surely there must have been other residuals other than the 3cm shortening that had not been fully reported. Besides in 1991 the award for an amputation of the leg was around RM40,000-RM45,000.

I was also referred to the case of *Chu Kim Sing & Anor v. Abd Razak bin Amin* [1999] 4 CLJ 448 where for the fracture of the femur with 1cm shortening and with the following residuals namely, walking with a limp, difficulty in climbing stairs and ladders, limitation of left knee movements, inability to squat for long periods, inability to sit cross-legged for prayers, inability to lift heavy objects, inability to run, pain in the left thigh in all conditions and wasting of left thigh muscles by 4cm and left calf muscles by 0.5cm, the court awarded RM35,000. For a 20cm long hypopigmented operative scar on the left thigh, a 3cm long hypopigmented operative scar on the left buttock, the court awarded RM15,800. To my mind the awards for both the fracture with residuals and the scars were highly excessive even though the case was heard in 1999.

Whilst I might have been inclined to have given a lump sum award of RM30,000 for the injuries and the scars taken together in the case before me, I see no plausible reason to interfere with the award made. Award of damages must be kept to a reasonable sum. It must not be seen that in awarding damages for physical injuries the courts are inclined to be punitive. Damages must be compensatory.

Loss Of Earning Capacity

The plaintiff testified that prior to the accident he was earning about RM600 including the overtime allowance. He was then working at Hicom Suzuki as an operator. He did not work for a year and did not on his own return to his former employment. He worked in a factory near his house and was paid RM300. He did not go back to Hicom Suzuki because he could not stand for a long time. The Assistant Personnel Manager of Hicom Suzuki testified that it was the plaintiff who made the decision not to return to work although, Hicom Suzuki had given the plaintiff an opportunity to return to work. The witness even agreed that Hicom Suzuki would have considered giving him a different job at the store which did not require the plaintiff to stand.

Subsequently the plaintiff worked as a labourer earning RM30 a day. He worked five days a week and earned an average of RM600 per month.

Mr. Brijnandan pressed for an award for loss of earning capacity on the basis of the specialist's report which showed there was wasting of the muscles with stiffness of the left knee, and with difficulties in squatting, praying and using the toilet and going up and down stairs. But these are disabilities for which the plaintiff has already been compensated for pain and suffering under the award for general damages. In fact in *Moeliker v. A Reyrolle and Co Ltd* [1977] 1 All ER 9, the Court of Appeal held that the question of loss of earning capacity should only be raised if there is a substantial or real and not merely a fanciful risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. In the case before me the plaintiff not only did not on his own free will, return to his former employment in spite of the fact that the employer would have given him a sedentary job, the plaintiff took on the job of choice of a labourer, whereby he had to do all those functions that the specialist said he would find difficulty in doing, namely squatting, going up and down the stairs and carrying heavy loads. This is a clear case if any, of an instance of what can be described as a fanciful risk of losing his employment. I therefore dismissed the appeal on quantum on both grounds. In the exercise of my discretion I directed each party to bear its own costs.